

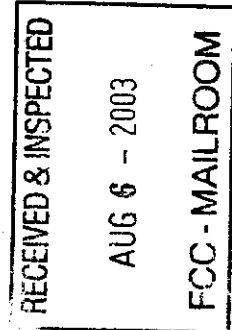


R M-10547

Federal Communications Commission
Washington, D.C. 20554

August 1, 2003

A. Wray Fitch, III
Gammon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, Virginia 22102-3807



Dear Mr. Fitch:

This concerns the petition for rule making you filed on April 23, 2001, on behalf of Four Him Enterprises, L.L.C. ("Four Him"), licensee of Station KHZR(FM), Potosi, Missouri, in which Four Him requests that the Commission amend Section 73.202(b) of its Rules, FM Table of Allotments, to substitute Channel 249C2 for the current Channel 249C3 as the frequency utilized by Station KHZR, Potosi, Missouri.

Since the proposed upgrade would cause a short spacing to Channel 248A at Station KDAA(FM), Rolla, Missouri, Four Him requested the substitution of Channel 276A for Channel 248A at Rolla. The foregoing change would result in short spacings to two other facilities: a vacant allotment on Channel 276A in Linn, Missouri, and Station KJEL(FM) Channel 279C, Lebanon, Missouri. Four Him requested that the short spacing to Channel 276A in Linn be eliminated by substituting Channel 248A for Channel 276A in Linn. Four Him also asserted that, in order to eliminate the short spacing to Station KJEL, that station should be reclassified as a Class C0 facility pursuant to the triggering procedures outlined in note 2 to Section 1.420(g) of the Commission's Rules. The staff agreed with Four Him that since Station KJEL operated below minimum Class C standards for FM broadcast stations, Station KJEL was subject to reclassification as a Class C0 facility, and that this reclassification would eliminate any short-spacing between Station KJEL and the proposed use of Channel 276A at the Station KDAA site. Therefore, in accordance with the reclassification procedures set forth in Section 1.420(g) of the Rules, we issued an *Order To Show Cause* to Ozark Broadcasting, Inc. ("Ozark Broadcasting") asking the licensee to show cause why its Station KJEL license should not be modified to specify operation on Channel 279C0 in lieu of Channel 279C at Lebanon, Missouri. That Order noted that a notice of proposed rule making would be issued only after the reclassified issued is resolved.

The *Order To Show Cause* released on September 20, 2002, instructed Ozark Broadcasting to respond to that order by October 21, 2002. When the staff did not receive a response to the order by November 4, 2002, the staff contacted counsel for Ozark Broadcasting and faxed him a copy of the order. Ozark Broadcasting filed an "Opposition to Order to Show Cause" ("Opposition") on November 5, 2002, and a "Motion to Accept Late-Filed Opposition" ("Motion") on November 6, 2002. Four Him filed an "Opposition to Motion to Accept Late Filed Opposition and Reply to Opposition" on November 13, 2002, to which Ozark Broadcasting filed a Reply on November 21, 2002, and an Erratum to that reply on November 26, 2002. In its

pleadings, Ozark Broadcasting explains that neither it nor its counsel received a copy of the *Order To Show Cause* prior to November 4, 2002, even though the *Order to Show Cause* instructed the staff to send a copy of the order by certified mail, return receipt requested, directly to Ozark. Ozark Broadcasting's Opposition and Motion stated that it intended to file an application for minimum Class C facilities at Station KJEL, and its Motion requested a period of 180 days from November 5, 2002, in which to file that application. Four Him asserts that Ozark Broadcasting's late-filed response to the *Order to Show Cause* should be denied because accepting that response would result in delay in the Commission's processing of rulemaking petitions and would result in general uncertainty concerning the principle that a licensee that does not respond to an Order to Show Cause by the date specified in the order is deemed to have consented to the modification proposed in the Order to Show Cause. Four Him also claims that Ozark Broadcasting received notice of the *Order to Show Cause* because that order was published in the Commission's releases on September 20, 2002, and such publication is deemed to be notice.

A review of official Commission records reveals no evidence that the Commission's staff actually mailed a copy of the *Order to Show Cause* to Ozark Broadcasting or its counsel. In this regard, Section 316(a)(1) of the Communications Act of 1934, as amended ("the Act"), clearly requires that the Commission provide written notice of such an Order to Show Cause to the licensee against whom the order is directed.¹ Further, statements made by the licensee's president² and counsel³ explain that the licensee did not receive notice of our *Order to Show Cause* released September 20, 2002, prior to November 4, 2002. Thus, we reject Four Him's arguments that Ozark Broadcasting received notice of the *Order to Show Cause*⁴ prior to November 4, 2002. We find that Ozark Broadcasting filed a timely response to the *Order to Show Cause*, given the fact that Ozark Broadcasting was unaware of the order's existence prior to November 4, 2002. Our reclassification rules allow a licensee desiring to keep its station in the Class C category a period of six months from the due date for its response to an Order To Show Cause, to file a construction permit application that will provide minimum Class C facilities. On April 1, 2003, Ozark Broadcasting filed its application (File No. BPH-20030401ABZ) for authority to improve its station to minimum Class C facilities. Thus, the

¹ 47 U.S.C. § 316(a)(1) The second sentence of Section 316(a)(1) of the Act reads as follows:

"No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to protest such proposed order of modification; except that, where safety of life or property is involved, the Commission may by order provide, for a shorter period of notice."

² See the Declaration filed by Ozark Broadcasting's president in Exhibit A to the licensee's Reply filed November 21, 2002.

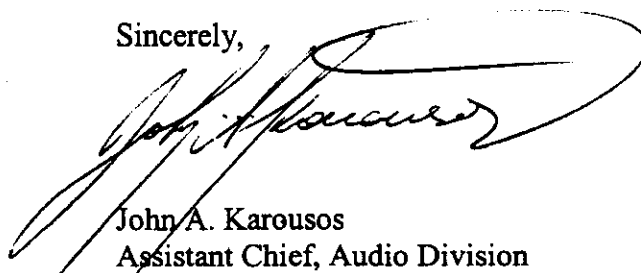
³ See Ozark Broadcasting's Opposition and Motion.

⁴ See *Fostering Expanded Use of UHF Television Channels (Stockton and Modesto, California)*, 4 FCC 2d 839, 845 (1966), which observes the following: "The show cause and waiting period provisions of [S]ection 316 are for the protection of the licensee or permittee affected, not other parties." The case also states: "There is no requirement that public notice be given of the issuance of a show cause order." 4 FCC 2d at 845 n.5.

application was filed less than six months from October 21, 2002, the date that the *Order To Show Cause* specified as the date by which Ozark Broadcasting should respond to that order. We find that Ozark Broadcasting's construction permit application was filed during the required time period and is "acceptable." Therefore, Four Him's petition for rule making must be dismissed pursuant to Note 2 to Section 1.420(g) of our Rules.

In light of the foregoing, the petition for rule making filed by Four Him Enterprises, L.L.C., IS
DIMISSED.

Sincerely,



John A. Karousos
Assistant Chief, Audio Division
Media Bureau